

Advocate

Lord Advocate

July 19. 1775.

INFORMATION

NIEL EARL of ROSEBERY, and for JAMES WATSON
Procurator-Fiscal of the Justice of Peace Court for the
Shire of Linlithgow, Chargers;

A G A I N S T

ARCHIBALD TAIT, late Overseer at Ochiltree, Suspender.

THE charger, Lord Rosebery, has bestowed much attention, and considerable sums of money, in the improvement of his estates; and it was impossible for him to carry on his extensive works, without reposing a good deal of trust in servants and overseers employed under him.

The suspender, Archibald Tait, was recommended to him some years ago as a faithful and diligent servant. The circumstances attending this recommendation, it is unnecessary to mention; but so it is, that the charger was, by ways and means, induced to entertain rather too favourable an opinion of Tait, and, for some time, to place too much confidence in him. He appointed him to be overseer of his farm at Ochiltree, in which situation he of course fell to have a considerable trust, which he abused in a very great degree; the charger having at length discovered that he had been in the practice of embezzling and disposing of hay, straw, and oats, belonging to the Earl, to a large amount, and applying the proceeds thereof to his own use, without accounting for the same.

The Earl having satisfied himself of Tait's guilt, considered it to be a duty he owed to the country, and a matter of great consequence to the public as well as to himself, that such an offence should

be allowed to escape ; and having advised with counsel, Whether he should make it the subject of a Justiciary prosecution before your Lordships ? it was thought proper, in a case of this kind, that he should go to the inferior courts, as, considering the inequality of the parties, it might be thought too rigorous to bring the suspender to trial before this High Court, where the expence, delay, and trouble attending the prosecution, could not fail to be much greater than before the Sheriff or Justice of Peace Courts.

Feb. 26. 1774.

Accordingly a warrant having been obtained from the Justices of Peace, to apprehend and incarcerate Archibald Tait till he should be liberated in due course of law, and he having thereafter been

April 15.

— liberated upon bail, a complaint was exhibited against him to the Justices, in name of Lord Roseberry, and of the Procurator-fiscal of court, setting forth “ That where by the laws of this, and every
 “ other well-governed realm, the feloniously abstracting and disposing upon any person’s property, applying the money arising
 “ therefrom to their own use, are crimes of a high nature, and severely punishable, and such crimes are highly aggravated when
 “ committed, in breach of trust, by a servant whose business it rather
 “ is to protect their master’s property, than to embezzle and alienate
 “ it to his prejudice : Yet notwithstanding whereof, true it is and
 “ of verity, that the said Archibald Tait is guilty art and part of
 “ the foresaid crimes, in so far as he, being employed by the private complainer, for these some years past, to oversee his farms at
 “ Ochiltree, did, while in the complainer’s service, at different times,
 “ in manifest breach of trust, in a felonious manner, abstract and
 “ dispose upon, to different persons, considerable quantities of hay,
 “ corn and straw, the property of the private complainer ; and
 “ particularly, the said Archibald Tait did, within these two years
 “ past, abstract from the complainer’s said farms at Ochiltree, a
 “ considerable quantity of straw, the property of the complainer,
 “ and dispose of it to Archibald Muckle in Ochiltree-mill ; as also
 “ a considerable quantity of hay at different times within the said
 “ period, and dispose of it to Walter Forrester writer in Linlithgow,
 “ and John Finlayson late vintner in Kirkliston, now in Falkirk ;
 “ the money arising from all which he applied to his own proper
 “ use : That besides these felonious or theftuous practices above-
 “ mentioned, the said Archibald Tait did, about the term of Whitsunday last, abstract from the complainer’s said farms of Ochiltree, and dispose of to the said John Finlayson, about three bolls
 “ of

“ of oats, the property of the said complainer, and applied the
 “ money arising therefrom to his own use ; at least the said Archi-
 “ bald Tait, during the time foresaid, hath been guilty, art and
 “ part, of theftuously abstracting from the complainer’s said farms
 “ at Ochiltree, and disposing of, at different times within the time
 “ foresaid, considerable quantities of hay, corn and straw, the
 “ property of the private complainer. By all which different
 “ acts of theft, committed in breach of trust as aforefaid, the pri-
 “ vate complainer hath fuffered considerably ; and therefore, upon
 “ all or any part of the premisses being confessed or proven, the
 “ said Archibald Tait, defender, ought and should be decerned and
 “ ordained, by decret of Court, to make payment to the com-
 “ plainer of the sum of L. 100 Sterling in name of damages and
 “ restitution ; as also, he ought to be fined and amerced in the
 “ sum of L. 20 Sterling to the Procurator-fiscal, and decerned in
 “ the expence of this process ; as also, he ought to be otherways
 “ exemplarily punished in his person, *in terrorem* of others to com-
 “ mit the like crimes in time coming.”

This complaint was served upon him with a list of witnesses ; and Tait having appeared personally, and by his procurator, gave in defences, in which he did not decline the jurisdiction of the Justices ;—on the contrary, he acquiesced in and prorogated the same, by pleading to the several articles of which he was accused, and endeavouring to explain them away. The defences are subscribed by Archibald Tait himself.

Of this date, a Justice of Peace Court was held, consisting of May 13 1774.
 four gentlemen, one of whom was the Sheriff-depute of the coun-
 ty, who presided ; and the libel and defences having been read
 and considered, the Justices found the libel relevant, and allowed
 the pursuers instantly to adduce their witnesses in proof thereof.

Among other articles of proof, the defender’s own declaration,
 emitted before Sir Robert Dalziel, one of the Justices of Peace,
 upon the 17th March preceeding, was produced, and eight wit-
 nesses were examined, whose depositions are hereto annexed, and
 will be perused by your Lordships, together with the written pro-
 ductions, particularly two letters from the suspender to John Fin-
 layson vintner in Falkirk ; by all which the libel was fully proved.
 And Tait having been asked, Whether he had any witnesses to ad-
 duce, or desired any proof ? he answered in the negative ; where-
 upon the Justices pronounced the following sentence : “ Having
 “ considered

“ considered this complaint, defences offered there-against, with
 “ the proof adduced, and books and writs produced, Find the
 “ defender Archibald Tait guilty of embezzling oats, hay, and
 “ straw, belonging to the Earl of Roseberry, under the defender’s
 “ trust, and therefore grant warrant to the constables to carry
 “ the said Archibald Tait from the bar of Court to the tolbooth of
 “ Linlithgow, the keepers whereof are hereby ordered to receive
 “ and detain him therein until Friday next the 20th curt. : And
 “ ordains the said Archibald Tait, at 11 o’clock of the forenoon of
 “ that day, to be carried by the constables from said tolbooth to the
 “ pillory at the mercat-cross of Linlithgow, and to stand thereon
 “ bare-headed until this sentence is audibly read over in his pre-
 “ sence ; and from thenceforth the Justices banish him this
 “ county for life, with certification, if he is found within the coun-
 “ ty at any time after the 10th June next, he will be apprehend-
 “ ed, and the Justices grant warrant to apprehend him according-
 “ ly, and to incarcerate him in the tolbooth of Linlithgow for the
 “ space of one month, and to be publicly whip’d through the
 “ town of Linlithgow on each market-day during that month,
 “ and thereafter to be re-banished ; and they appoint the like
 “ imprisonment and whipping to be repeated as often as the said
 “ Archibald Tait shall be found within this county, and decern
 “ accordingly.”

This sentence having been pronounced, Archibald Tait protest-
 ed, and appealed to the Quarter-Sessions. But in place of prose-
 cuting that mode of redress, he applied to the Court of Session by
 June 25. 1774. Suspension ; and, of this date, the Lord Stonefield Ordinary having
 considered the Bill, with Answers, Replies, Proof, and other
 papers produced, refused the Bill.

He next applied to your Lordships by another suspension ; and
 a sist having been given thereon, the cause came to a hearing before
 Feb. 18. 1775. the Court, of this date, and the following order was pronounced :
 “ The Lord Justice Clerk, and Lords Commissioners of Justiciary,
 “ having heard parties procurators, they ordain them to give in
 “ Informations upon these points : 1st, How far Justices of Peace
 “ have a jurisdiction to try the crime charged in the original com-
 “ plaint exhibited against the suspender ; and 2^{dly}, Whether they
 “ could proceed in such complaint without calling a jury ; ordain
 “ these Informations to be printed, and given in to the Clerk of
 “ Court, in order to be recorded betwixt and the first day of June
 “ next;

“ next; continue the dyet of the said suspension till Monday the 26th of the said month of June, and ordain all concerned then to attend, each under the pains of law.” In obedience to which order, this Information is humbly offered on the part of the chargers, who will confine what they have to say to the two points mentioned in the above interlocutor, taking it for granted that the offences charged against the suspender are already established by the proof taken before the Justices.

Before entering upon the argument, it is proper to observe, that as Lord Rosebery had no other view or motive whatever in bringing this matter to a trial of any kind, than to obtain some degree of reparation to the public, and to himself, for an offence which seemed to merit being enquired into, so he does not look upon himself as interested to support the sentence of the Justices to any greater extent, than shall appear to this Court to be perfectly reasonable and just in the circumstances of the case; and, in particular, if your Lordships shall be of opinion, that the Justices ought not to have gone the length of pillory and banishment, but ought rather to have inflicted some lesser sentence, such as a pecuniary fine, damages and imprisonment, he can have no objection to the cause being remitted, with any instructions that the Court shall think proper to give for mitigating the sentence. The only thing that he feels anxiety for, is, that so great a trespass shall not be allowed to escape with impunity, by suspending the sentence altogether, which seems to be contended for on the part of Archibald Tait, as your Lordships will easily see how bad a precedent this would be in the country, and to what dangerous consequences it might lead.

The *first* question stated in the interlocutor is, “ Whether the 1st Point. Justices of Peace have a jurisdiction to try the crime charged in the original complaint exhibited against the suspender ?”—With regard to this, the chargers, with submission, cannot think there will be any doubt of answering it in the affirmative. The complaint was clearly relevant. It was exhibited by a master against his servant, charging him with frauds and embezzlements committed by him in that character, specifying the several instances, and concluding for restitution, a fine to the public, and, in general, that the defender should be punished as an example to others.

Being a question between master and servant, the cognizance of it appeared to be not only competent, but peculiarly fitted to the jurisdiction of the Justices, as it has always been understood, that this is one of the branches of jurisdiction particularly intrusted to the

Justices of Peace. Thus Mr Forbes, in his *Treatise of the duty and powers of Justices of Peace*, part II. p. 58. in enumerating the different articles to which their duty and powers extend, in so far as concerns the public policy, security, and government, mentions, *inter alia*, this as one of them, *viz.* “ For causing masters, or their servants “ and apprentices, do just things to one another.” In the present case, Lord Roseberry had good reason to complain of the defender, as having done very unjust things to him in his capacity of a servant and overseer of one of his farms, and he naturally applied to the Justices of Peace of the county as the proper judges between master and servant.

Further, as it was a question in which the policy and improvement of the country was not a little concerned, this seemed to be an additional reason why he ought to make his application to the Justices of the Peace, to whose immediate inspection and care all such matters are understood to be committed.

He did not bring this case before them as a capital trial for theft, but he stated it as a fraudulent breach of trust committed by his servant, which ought to infer restitution, and some degree of punishment, which he left entirely to the discretion of the Justices. Out of tenderness to the defender, he was willing to consider the case as one of those petty transgressions which might be summarily enquired into by any inferior judge, and more particularly by the Justices of Peace, being a transgression of duty by a servant, committed by him in that character. The action which he laid against him was of a mixed nature, partly civil, partly criminal, complaining of the undue practices of his servant, and concluding for redress by restitution of what he had embezzled, and inflicting a fine, &c. so that it does not occur what objection could lye either to the competency or relevancy of the process.

The defender says, That Justices of Peace are mere creatures of statute: That by the Scots acts before the Union, they had only certain powers committed to them of judging in blood-wits, riots, and other matters relative to the peace; and in these they could not go beyond a pecuniary fine: That the act of Queen Anne, conferring upon them the powers of the English Justices, was still limited to matters of the peace, and that it would not be expedient to extend their powers, especially now that, from political views, it often happens that very unfit persons are named in the Commission of the Peace.

In

In answer to these observations, whatever may have been the original constitution of Justices of Peace in Scotland, which is a subject involved in a good deal of obscurity, it is certain, that they have for a long time past been considered as invested with a radical jurisdiction, both civil and criminal, and more especially with a criminal jurisdiction, to try and punish small offences happening within their bounds, though not strictly falling within the description of any of those cases which are specially mentioned in the statutes. Lord Bankton says, "The Commissioners, or Justices of Peace, are intrusted chiefly with a *criminal jurisdiction*, as their title imports. They are instituted as guardians of the country against disorders, riots, or other breaches of the peace, by binding persons suspected to their good behaviour, and punishing such as offend against the peace, by fine, *scourging*, or *imprisonment*." And in § 5. he talks of their cognoscing in trespasses or petty crimes, without making any distinction between one species of trespass and another.

Vol. II. p. 568.
§ 1.

Their office was borrowed from that of the Roman *Irenarchæ*; but at what time they were first introduced here, is not very certain. The act 1609, *cap.* 2. seems to establish them upon a regular footing. It ordains, "That, in every schyre within this kingdome, there shall be yearlie apoynted by his Majestie, some godlie, wyse, and vertuous gentlemen, of good quality, moeyen and report, making residence within the same, in sik number as the bounds of the schyre shall requyre, to be Commissioners for keeping his Majestie's peace, to whom his Majestie, with advice of his Privie Councill, shall give power and commission to oversee, try, and prevent all sik occasions as may breed trouble and violence amongst his Majestie's subjects, or forceable contempt of his Majestie's authoritie, and breach of his peace."

By acts 1617, *cap.* 8. they are ordained to take an oath, "That they shall, according to their knowledge, wit, and power, do equal right both to rich and poor, conform to the laws and customs of the land, and statutes thereof." And certain directions are given to them as to their procedure, being *inter alia* required to punish and fine those guilty of committing riots, and breaking the King's peace, according to the quality of the crime, and the estate of the offender; to put the law in execution against wilful beggars, vagabonds, and ressetters; to give order about mending high-

high-ways and passages, and prevent nuisances upon them; and if any person refuse to concur for mending of high-ways and passages, they shall have power to censure and punish them according to their discretion; to put the acts of Parliament in execution against cutters and destroyers of planting, green wood, orchards, yards, hainings, breakers of dove-houses, and conningers, stealers of bees and bee-hives, users of unlawful games, with lying dogs, slayers of red and black fish and smolts in forbidden time, fowlers fowling in other mens lands, makers of muir-burn and moss-burn, setters of cruives or nets in waters and dams, having and keeping of cruives and yairs in forbidden time, and “to
 “ set down order in the country for governance in time of plague,
 “ and shall *punish severely* the disobeyers of the order appointed by
 “ them, *according to the quality of the delict.*”

They are further ordained to appoint “the ordinary hyre and
 “ wages of labourers, workmen, and servants; and who shall re-
 “ fuse to serve upon the price set down by them, shall be impri-
 “ soned, *and further punished at their discretion*: And, to the effect
 “ that servants may be the more willing to obey the ordinances
 “ to be made by the said Justices, and the said fees, the
 “ said Justices shall have power to decern and compel the
 “ masters to make payment of the fees appointed by their
 “ ordinance, in case the servants please rather to pursue for the
 “ same before them than any other judge.” They are like-
 ways ordained “to set a price upon craftsmens work, and upon
 “ the ordinars of penny-brydals; together with the price of
 “ shearers fees, and to *punish the contraveeners as appertaineth*; to set
 “ down acts against drunkards;” and to do various other things
 too tedious to enumerate.

It is evident that this act was not so much intended to confer any new jurisdiction upon them, as to point out more clearly, those particulars in which the legislature expected they should proceed with activity and diligence in the execution of the duties already committed to them by the nature of their office, and by the laws and customs of the kingdom. Their jurisdiction is there taken for granted; and they are, in many of the articles, left to exercise *discretionary* powers of punishment, which would not have been the case, had a new jurisdiction been meant to be conferred.

The next act relative to them is 1633, *cap.* 25. which only confirms the last mentioned act; and Oliver Cromwell having, in 1655, given new instructions to the Justices, which, as Mr Forbes

bes observes, inspired the office with more life and efficacy, the same were adopted after the Restoration by the act 1661, *cap.* 38. which proceeds upon the narrative, "How much the appointing
 " of Justice of Peace and Constables did contribute to the peace,
 " quiet, and good government of the kingdom, and to the speedy
 " and impartial execution of law and justice to all persons subject-
 " ed to their jurisdiction and power." The oath above mentioned is renewed, together with the instructions formerly given by the act 1617, and various others, such as, to punish profane swearing, and fornication: "And in any of the cases before specified in
 " this instruction, the said Justices shall put in execution all such
 " laws, *as for corporal punishments*, as have any provisions mentioned
 " in them for such cases; and in case of the inabilities of the parties delinquents to pay the sum mentioned in this instruction,
 " the said Justices shall put in execution such laws, as for corporal punishments, as have any provision mentioned in them for
 " such cases; and that the wives delinquents shall be punished
 " according to the quality of their respective husbands; and that
 " their husbands shall be liable for the payment of their wives
 " fines respectively."

The act 1685, *cap.* 16. again bestows an encomium upon this jurisdiction of the Justices, and ratifies the former acts relative to them, giving them additional instructions to put the laws in execution against all who should be guilty of attending conventicles, of irregular baptisms and marriages, withdrawing from church-ordinances, and other such disorders, in so far as they were not capital. This act was repealed by 1690, *cap.* 28.—but the others were left in force.

So matters stood at the time of the Union; and by the act 6th of Q. Anne, *cap.* 6. intituled, "An Act for rendering the Union
 " of the two kingdoms more entire and complete," it is, *inter alia*, enacted, to the end the public peace may be preserved throughout the whole united kingdom, "That in every shire and stewartry
 " within that part of Great-Britain called Scotland, and also in
 " such cities, boroughs, liberties, and precincts within Scotland,
 " as her Majesty, her heirs or successors, shall think fit, there shall
 " be appointed by her Majesty, her heirs or successors, under the
 " Great Seal of Great-Britain, a sufficient number of good and
 " lawful men to be Justices of the Peace within their respective
 " shires, stewartries, cities, boroughs, liberties, or precincts;
 " which

“ which persons so appointed, over and above the several powers
 “ and authorities vested in Justices of the Peace by the laws of
 “ Scotland, shall be further authorised to do, use, and exercise o-
 “ ver all persons within their several bounds, whatever doth ap-
 “ pertain to the office and trust of a Justice of Peace, by virtue
 “ of the laws and acts of Parliament made in England before the
 “ Union, in relation to, and for the preservation of the public
 “ peace ; provided nevertheless, that in the Sessions of the peace
 “ *the methods of trial and judgments shall be according to laws and customs*
 “ *of Scotland.*” And by 8th Anne, *cap.* 16. § 3. regulations are
 laid down as to their taking informations, and making present-
 ments to the Circuit-courts, of such crimes as fall to be tried there ;
 but this does not in any shape diminish or take away the power
 which they have always had of cognoscing upon small offences
 themselves.

Since the Union, the commissions of the peace issued to the Jus-
 tices in Scotland have been precisely in the same terms with the
 English commissions. Your Lordships will see the tenor of them
 in Burn, *voce* Justices of the Peace. In § 2. they are directed
 not only to enquire into all felonies, &c. but “ to make and con-
 “ tinue processes thereupon, against all and singular the persons
 “ so indicted, or who before you hereafter shall happen to be in-
 “ dicted, until they can be taken, surrender themselves, or be out-
 “ lawed ; and to hear and determine all and singular the felonies,
 “ poisonings, inchantments, sorceries, arts magic, trespasses, fore-
 “ stallings, regratings, ingrossings, extortions, unlawful assemblies,
 “ indictments aforesaid, and all and singular other the premisses,
 “ according to the laws and statutes of England, as in the like
 “ cases it has been accustomed, or ought to be done ; and the same
 “ offenders, and every of them, for their offences, by fines, ran-
 “ soms, amerciaments, forfeitures, and other means, as, according
 “ to the law and custom of England, or form of the ordinances
 “ and statutes aforesaid, it has been accustomed, or ought to be
 “ done, to chastise and punish.”

In the Scots commissions, in place of the word *England*, the
 words *the kingdom* are inserted, and this is the only difference be-
 tween the two.

The chargers do not mean to say, that the Justices of Peace of
 this country have in practice exercised their jurisdiction to the
 same extent with the English Justices in the matters here commit-
 ted

ted to them, tho' it may seem they are intitled so to do by the tenor of their commission, and by the act of Queen Anne: But it is enough in the present argument to show, that their powers are extensive, and that they at least ought not to be challenged where they go no further than to take cognizance of *small offences* arising within their bounds, and in matters which by law or custom have always been considered to fall within their jurisdiction.

In England, it is presumed this question would not admit of a doubt. Your Lordships will observe in Burn, *voce* Servants, a variety of questions stated between master and servant, some of them amounting to felony, such as article 12th, intituled, "Servant stealing his Master's goods," which is felony both by an act in Henry VIII's time, and at common law, but not without benefit of clergy; and Forbes, part II. p. 88. and 89. takes notice of the different questions between master and servant in the law of England, and says the Justices of Peace decide such differences. In some cases, the punishment goes the length of whipping, being set in the stocks, or confined in the house of correction. Every sort of fraud seems to be peculiarly committed to them, *ibid.* p. 33.—and he says, they may punish servants for assaulting or abusing their master, mistress, or overseer, according to the quality of the crime, so as they proceed not to life or limb, p. 142.

In short, if the Justices of Peace have any jurisdiction at all in this part of the kingdom, it is in that matter which is now under the consideration of your Lordships, *viz.* in questions between master and servant, and particularly in taking cognizance of frauds and breaches of duty committed by servants against their masters; and therefore, upon the *first* head, it does not seem material to trouble your Lordships with further argument. The abolishing this jurisdiction would be attended with very hurtful consequences; and it is a very frivolous as well as unjust observation, that the persons named are often unworthy of their office. This is an arraignment of the King and his Council by whom the justices are appointed, and probably, the suspender was in a mistake in confounding Justices of Peace with Commissioners of Supply.

The 2d question is, "Whether they could proceed in such ^{2d Point.} complaint without calling a jury?"—As to this it is presumed the only difficulty your Lordships had, was, Whether they could proceed to inflict punishment and pillory without a jury? For that they could take cognizance of the fact charged, to the effect of every pecuniary consequence, and even imprisonment, upon supposition

position that they are at all competent to such a question, can hardly admit of any dispute; and the chargers do not recollect that the defender himself carried his argument any further than is here mentioned.

This branch of the cause, therefore, does not go to the competency of the action itself, but to the propriety of the sentence pronounced by the Justices; and the only consequence of your Lordships being of a different opinion from them upon this head, would be to mitigate the sentence, or to remit with an instruction to that purpose, but not to cast the action altogether.

It is, however, with submission thought, that the nature of the offence was such as to justify the sentence, and that the Justices have not gone beyond what is customary in such cases. No instance has been discovered of any trial by jury before the Justices of Peace in this country; but there are many instances of offences, such as the present, having been tried and punished by inferior judges and magistrates to the same extent, without the intervention of a jury.

In the books of Adjournal, a case is found, dated 13th July 1739, where Robert Dow, gardener to Charles Hope-Wier, Esq; of Craigie-hall, was prosecuted before the Justices of Linlithgowshire, at the instance of his master and the Procurator-fiscal, as guilty art and part with James Niven, and others his fellow-servants, of having been in a course of breaking into the brew-house and cellar of Craigie-hall, and stealing from thence quantities of wines, brandy, ale, beer, and concealing the same until they had time to drink it, at least of drinking said liquors, knowing them to be stolen. The Justices found it proven, by their respective confessions, that they were guilty, and adjudged them to be imprisoned till Saturday 26th May, and then to be conveyed to Queensferry, to be whip'd through the said borough by the hands of the hangman of Linlithgow, and from thence to be brought back to Linlithgow prison, there to be detained till the first Friday of June, then to be whip'd through Queensferry, and thenceforward to be whip'd through the said borough of Linlithgow, on the first Fridays of July, August, September and October, and then to be burned on the backs with the iron commonly made use of by the borough of Linlithgow, and thereafter banished the same.

Dow applied by Suspension to this Court, *imo*, Because the Justices were not judges competent to such thefts as could merit whipping

whipping and banishment. *2do*, Because such severe sentence could not be pronounced by any judge *de plano*,—nor any subject made liable to such severities, but upon his being put upon his country by a jury trial.

To the *first* of these reasons it was answered, That the Justices were competent judges to this complaint, by 1661, *cap.* 38. and by the laws made since the Union, which gave a higher jurisdiction to the Justices, whereof they were in daily practice. To the *2d*, That the Magistrates of all boroughs, as well as the Justices and other inferior judges, were in constant practice of punishing atrocious thefts, such as this was, with whipping and banishing the country.

Your Lordships, upon this debate, suspended the sentence against the said Robert Dow *simpliciter*, except that part thereof, ordering him to be whipped through the borough of Linlithgow on the first Friday of August then next, which you ordained to be put in execution in all points, and the said Robert Dow to be set at liberty. This shows, that the objection of want of a jury was not regarded.

In another case, November 1747, Robert Drummond printer in Edinburgh, was prosecuted before the Bailies of Edinburgh, at the instance of the Procurator-fiscal, for publishing a scandalous libel against some persons of the highest rank. The Bailies ordained the paper to be burnt by the hands of the common hangman on the 25th November, and the said Robert Drummond to be carried to the tolbooth, therein to be detained till that day, and then to be carried to the Cross, and there to stand bare-headed during the burning of the said copies, with a label on his breast, bearing, “ For printing and publishing a false, scandalous, and “ defamatory libel.” And further, they deprived him, for the space of one year, of the rights and privileges of a freeman-burgess of Edinburgh, and banished him furth of the city and liberties for the said space, and ordered him to be carried back to prison till he found caution to remove himself out of the said city and liberties within 48 hours after the date of the said bond, not to return during said space under the penalty of L. 100 Sterling, and being detained in prison for the remainder of the year.

Drummond applied by Bill of Suspension to this Court, and, among other particulars, complained of the want of a jury: That this was the birth-right of every British subject, and more especially

ally where the punishment exceeded a pecuniary fine. Your Lordships, however, refused the Bill without Answers.

In the case of Mr John Lookup, 19th June 1755, being pursued before the Justices of Perth-shire upon the statute against duelling, he complained, in a Bill of Advocation, that the Justices meant to proceed summarily,—whereas he ought to be tried before this Court, and by a jury. Upon Answers, your Lordships remitted, with an instruction to proceed as in a common riot, and not upon the act against duelling. In many other cases your Lordships have remitted with instructions.

John Falconer, carter at Kames, was, of date 21st March 1757, sentenced by the Sheriff for using false keys, and stealing victual. The sentence was expences, imprisonment, and banishment from the county for life. Your Lordships refused a Bill of Suspension against this sentence, tho' he complained that he had been tried without a jury.

In another case, Alexander Flight having been pursued before the Bailies of Cupar for insulting the Provost, was, by sentence 13th June 1767, fined, imprisoned for a month, and banished from the town for three years, without a jury. The sentence was suspended only as to banishment.

The chargers have inquired, and they find innumerable instances of persons being sentenced to be whip'd by the Sheriff of this county, and by the Magistrates of this city, for thefts and other such crimes, without jury. A note of some of these instances, which have happened within these few years, is produced; and they are informed, that the practice is general all over Scotland.

The sentence, in this case, has the support of immemorial usage in all the inferior courts of this country, and it is believed there are few instances in which this practice has been abused; neither is this the only instance where a jurisdiction, founded upon antient usage, has been sustained,—as indeed the law of every country acknowledges *consuetudo* as a material branch of law.

The acquiescence of a country for ages, explains and proves what is law; and, in this way alone, have the Commissaries, the Judge-Admiral, and other Judges, acquired jurisdictions in certain matters which did not strictly fall within their cognizance; and the Judge-Admiral, as a Magistrate of Police upon the sea, has, by use, acquired a right of trying certain trespasses, *de plano*, without

out any jury,—as was found in a case observed by Lord Kilkeran, p. 299.

In the present state of the law of this country, if petty crimes could not be tried by inferior judges without jury, to the effect of whipping, or other lesser sentences, the country would be uninhabitable. The forms of our criminal law must be altered, and our courts entirely new-modelled, before the antient practice can be abolished. Jury trials are at present attended with so much trouble, expence, and inconvenience, that if they are made necessary in small cases, there is a danger that such cases may pass altogether unnoticed ; and it will therefore be a matter of very serious consideration with your Lordships, whether you ought to pronounce any judgment which may have the effect of carrying such an idea into the country.

It only remains to be noticed, that the suspender having consented to, and prorogated the jurisdiction,—this is an additional reason why the action cannot be cast.

It is scarce necessary to take notice of some very illiberal reflections which were thrown out by the suspender, against the conduct of his master towards him. He flatters himself, that if they are again repeated, they will make no impression upon your Lordships, being equally injurious and destitute of truth ; and therefore, upon the whole, the chargers conclude with hoping, that your Lordships will repel the reasons of suspension.

In respect whereof, &c.

I L A Y C A M P B E L L.

MINUTES and PROOF, IN THE PROCESS

At the instance of the Right Hon. NIEL Earl of ROSEBERRY,
and JAMES WATSON Procurator-fiscal of the Justice of Peace
Court of *Linlithgow-shire*, before the Justice of the Peace;

A G A I N S T

ARCHIBALD TAIT, late Servant or Overseer to the said EARL,

Linlithgow, May 13. 1774.

Sederunt — Alexander Barron of Preston,
William Baillie younger of Polkemmet,
Henry Gillies Provost of Linlithgow,
John Dundas of Dudingston.

Mr B A I L L I E chosen P R E S E S.

PURSUERS *per* Watson.

— DEFENDER present.

THE Complaint read over, to which the defender gave in Defences, subscribed by him, which were also read.

“ The Justices having considered the libel and the defences, find
“ the libel relevant, and allow the pursuers instantly to ad-
“ duce their witnesses in proof thereof.

(Signed) WILL. BAILLIE, *Preses.*”

WATSON for the pursuers, *in modum probationis* of the libel,
produced a declaration emitted by the defender before Sir Robert
Dalziel of Binns, Bart. one of the Justices of the Peace of this county,
E which

which is signed by the defender and Sir Robert Dalziel, and bears date the 17th day of March last; and the said declaration being shown and read over to the defender, he admitted the same was the declaration which he emitted time and place mentioned therein, and adheres to the facts in said declaration, excepting that he there mentions having entered in his books the article of oats sold to Finlayson at the period they were delivered,—which is a mistake, for that he only entered these oats into his books some time afterwards, and could not enter them at the time Finlayson received them, the price not being then fixed.

(Signed) { ARCHIBALD TAIT.
WILL. BAILLIE, *Preses.*

THEN the said JAMES WATSON produced an execution against the witnesses annexed to the Complaint, who being called upon, compeared and emitted their oaths as follows, viz.

Witness 1. A THOMAS TAYLOR, overseer and cashier to the pursuer the Right Hon. the Earl of Roseberry, against whom the defender objected, That the witness bore malice against him, in so far that he said to different people, that he would do for the defender; which the Justices having considered, in respect the defender does not offer to verify his objection instantly, they supersede giving judgment upon it until the witness is examined *in initialibus*.

(Signed) WILL. BAILLIE, *Preses.*

C THE said THOMAS TAYLOR, aged 24 and upwards, not married, being solemnly sworn, purged and examined, depones, That he never, to the best of his remembrance, said to any person, that he would do for the defender,—nor does the deponent bear any malice or ill-will towards the defender. And this is truth as he shall answer to God.

(Signed) { THOMAS TAYLOR.
WILL. BAILLIE, *Preses.*

E “ The Justices having considered what the witness has deponed as above, repel the objections stated against him, and allow his examination to proceed,

(Signed) WILL. BAILLIE, *Preses.*”

THE said THOMAS TAYLOR being then further interrogated *in A*
causa, depones, That he has been in the service of the Earl of
 Rosebery for about three years: That the defender had entered
 to the said Earl's service about six months before the deponent,
 as he was informed. Depones, That about a twelve-month ago,
 or upwards, the deponent heard the said Earl discharge the defen- B
 der to uplift any of his money,—and that this happened at Barn-
 bougle: That the Earl seemed to be angry at the defender; and
 the deponent understood the reason to be, that the defender
 had brought money to the deponent from some people the
 defender had been dealing with on the Earl's account. De- C
 ponos, That Walter Forrester, writer in Linlithgow, did, in
 September or October last, inform the deponent, that he
 had brought from the defender twelve hundred stones of old
 hay, and two hundred stones of new hay: That the depo-
 nent having previously noticed that the two hundred stones of D
 new hay had not been given up by the defender in his books,
 did, some time afterwards, inquire at the defender about it: The
 defender said, that the two hundred stones were not my Lord's
 hay, but belonged to Peter Paris: That the deponent having also
 spoke to Mr Forrester a second time about said hay, about four or E
 five weeks, as he thinks, after he had spoke to him first, Mr For-
 rester then said, that the defender had told him the said two hun-
 dred stones of old hay belonged to Peter Paris; and the deponent
 is not certain whether this second conversation with Mr Forrester
 was before or after he had spoke of said hay to the defender: That F
 about this time, the deponent and defender were both generally
 residing at Barnbougle. Depones, That at the deponent's first
 conversation with Mr Forrester as above, Mr Forrester told the
 deponent he had paid the defender L. 10 to accompt of the hay;
 and that, previous to this first conversation, the defender told the G
 deponent, that Mr Forrester had only paid L. 6 of the price of the
 hay, and the deponent had seen it so marked in his books; and
 the defender offered the deponent the said L. 6, but which he re-
 fused to receive. Depones, That he knows that oats were sent
 to the defender, and that the defender also bought oats for the H
 use of the farm of Ochiltree, for sowing the ground, or feeding
 the horses: That the deponent did not understand that the de-
 fender had any allowance from my Lord to dispose upon the oats
 that were sent to Ochiltree. And the deponent having exhibited

- A a ledger-book kept by the defender, being a *Folio*, also another ledger-book in *octavo*, with a book in *folio* containing the accompts of the day-labourers, depones, That the said three books are all the books the deponent can find at Barnbogle belonging to the defender : That said books were kept
- B by the defender at Ochiltree while he staid there : That the defender having afterwards come to stay at Barnbogle, brought said books along with him, and that the said books lay in the writing-room, or in a press in that room, of which sometimes the deponent, and sometimes the defender kept the key,—but that the
- C defender had always access to the said books. Depones, That the accompt entered in *folio* 123 of the folio-ledger, exhibited as above, under the title *Archibald Tait debtor*, is of the defender's hand-writing ; and that the deponent saw the defender write part of the said accompt at Barnbogle a few days before my Lord last
- D left Scotland, which was about the 27th or 28th of January last, and after my Lord had challenged the defender for embezzlement ; and the deponent does not think that any part of that accompt was wrote in said book until after the defender was charged with embezzlement. Depones, that the accompt entered in *folio* 37th of
- E said folio-ledger, under the title of *Oats received*, is also of the defender's hand-writing. And depones, That the accompt entered in the 44th page of the octavo-ledger, titled *Steel-bow straw received*, is also of the defender's hand-writing : That the three books above deponed to are marked by the deponent, and Judge examiner,
- F as relative hereto. Depones, That he has seen a third ledger-book belonging to the defender, of an older date : That the deponent cannot now find it at Barnbogle, nor does he know nor suspect where it is. *Causa scientie patet, &c.*

(Signed) { THOMAS TAYLOR.
WILL. BAILLIE, *Preses.*

- G The defender acknowledges the accompts mentioned in the deposition of Thomas Taylor, the immediate preceding witness, to be of his (the defender's) own hand-writing. .

(Signed) { ARCHIBALD TAIT.
WILL. BAILLIE, *Preses.*

Wit. 2. H WILLIAM MURTON, late overseer to the pursuer at Barnbogle, now in Leith, aged 34 years, and married, being solemnly sworn,

sworn, purged and interrogated, depones, That the deponent entered to the service of the Earl of Roseberry as an overseer about the end of the year 1770, and left said service in the year 1773 ; and that the deponent continues to be employed by my Lord in buying and selling his cattle : That during the time the deponent was in said service, the defender was my Lord's overseer of his labourers at Ochiltree : That it consists with the deponent's B knowledge, that the defender was not authorised, or allowed by his Lordship, to receive any money ; but that the money arising from articles sold by the defender, was to be paid to the deponent, or Mr Taylor the preceding witness. Depones, That there were no oats grew on the farm of Ochiltree under the defender's management, crop 1772 ; and that what oats were sent to Ochiltree in Spring 1773, were intended for seed, and feeding the horses, but none sent there for sale. Depones, That the three books mentioned in the deposition of Thomas Taylor the preceding witness, now shown to the deponent, were the defender's books, D and to which the defender had access after they were brought to Barnbogle. Being interrogated by the defender, depones, That on one particular occasion, when the deponent could not himself get to Ochiltree to receive the money for grazing some cattle, the defender, at the deponent's desire, uplifted said money, and E brought it to Barnbogle, and gave it to the deponent : That the deponent does not recollect that he received any money from the defender, other than on the particular occasion above-mentioned. *Causa scientie patet, &c.*

(Signed) { WILLIAM MURTON, F
 { WILL. BAILLIE, *Preses.*

ROBERT MEIKLE, son to James Meikle tenant in Braidlaw, aged 36, not married, being solemnly sworn, purged, and examined, depones, That in March was a year the deponent was employed by the defender to drive two double carts of hay, each cart containing sixty stones, from Kippetstone in Ochiltree to John Finlayson vintner in Falkirk, and that he drove and delivered the same accordingly. Depones, That about a year before the time last mentioned, he saw Archibald Meikle in Ochiltree-mill carrying away from Braidlaw in Ochiltree a quantity of bear-straw, which he understood Meikle had bought from the defender. Upon the interrogatory of the defender, depones, That he has been frequently

Wi. 3.

A frequently employed by the defender to carry hay to different people, but never was desired by the defender to conceal any part of said hay. And depones, That his brother assisted him in driving one of the double carts above mentioned to Falkirk. *Causa scient i patet, &c.*

B

(Signed)

{ ROBERT MEIKLE.
{ WILL. BAILLIE, *Preses.*

Wit. 4.

JOHN FINLAYSON vintner in Falkirk, aged 35, married, being solemnly sworn, purged and examined, depones and exhibits an
C accompt of hay sold to him in the 1773 by the defender, of the defender's hand-writing: That the deponent received the different articles in said accompt, but that he paid the first article a few days after he received it; and that said accompt includes, as the deponent believes, the whole articles of hay he received from the
D defender in the period therein mentioned. Depones, That of said accompt (besides the first article as above deponed to) he paid to the defender, at one time L. 6, at another time L. 5 : 10 s. at another time L. 3 : 8 s.; and the deponent's wife informed him, that at another time, when he was from home, the defender hav-
E ing sent a letter by his brother-in-law, craving payment of L. 5, she gave the man the said L. 5, for which he left a receipt, but which is now fallen by. Depones, That the L. 3 : 8 s. mentioned above, was paid to the defender as follows, *viz.* five shillings when the defender was at the August tryst of Falkirk, and the re-
F maining three guineas when he was at the October tryst: That at this last time the defender craved the money on Lord Roseberry's account, which was in the morning, and promised to return in the evening and grant a receipt, but which he did not do. Depones, That in December last, he received a letter from
G the defender, which he now exhibits, bearing date the 19th of December 1773: That he also received another letter from the defender, with a bill inclosed therein; which other letter and bill the deponent also now exhibits, the last-mentioned letter bearing date the 27th January 1774, and the bill bearing date the 6th of
H December 1773; which two letters and bill are now marked by the deponent, and Judge-examinator, as relative hereto. Depones, That in the month of April 1773, he bought and received from the defender, three bolls of oats from the farm of Ochiltree: That there was no fixed price at the time: That the said oats were very much damaged: That the deponent sold one of the bolls at about nine shillings and six-pence, and he mixed the remainder with
other

other corn, and disposed of them in his stable : That the defend-
er told him at the time he bought the oats, and before delivery,
that the oats he was to send him were the remains of oats he had
got to sow, but which were not needed. *Causa scientiæ patet,*
&c. A

Signed { JOHN FINLAYSON.
WILL. BAILLIE, *Preses.* B

MICHAEL RITCHIE in Ecclesmachan, aged 27 years, married,
being solemnly sworn, purged and examined, depones, That in
Spring about two years ago, the deponent bought from the defend-
er some straw : That he does not remember the quantity, but it
was not above ten shillings worth : That he received said straw at
Braidlaw, which was part of steel-bow straw left there by James
Meikle the late tenant. Being interrogated by the defender, de-
pones, That the defender did not desire him to conceal any thing
concerning this transaction. *Causa scientiæ patet, &c.* C Wit. 5.

(Signed) { MICHAEL RITCHIE.
WILL. BAILLIE, *Preses.* D

ARCHIBALD MEIKLE tenant in Ochiltree-mill, aged 56, mar-
ried, being solemnly sworn, purged and examined, depones, E
That in winter was two years, and Spring thereafter, he received
from the defender, bear-straw to the amount of L. 1 : 15 s. which
straw was the stails of two bear-stacks, and was part of the steel-bow
straw which James Meikle left when he removed from Braidlaw,
and that the deponent paid to the defender said sum. *Causa sci-* F
entiæ patet, &c. Wit. 6.

(Signed) { ARCHIBALD MEIKLE.
WILL. BAILLIE, *Preses.*

JOHN MILLER, son to Robert Miller in Riccarton, aged 36, G
married, being solemnly sworn and examined, depones, That he
knows the defender, in Spring was twelve months, sold and deli-
vered to John Finlayson, a former witness, ten firlots or three bolls
of damaged oats. *Causa scientiæ,* the deponent was servant at
Ochiltree at this time. And this is truth, &c. H Wit. 7.

(Signed) { JOHN MILLER.
WILL. BAILLIE, *Preses.*

Wit. 8. A GEORGE M'ALPIN in Ochiltree, aged 50 and upwards, married, being solemnly sworn, purged and examined, depones, That he and his brother bought a small rick of hay from the defender in Harvest last, at 4½d. *per* stone, and took it upon a computation of sixty stones. Depones, That, some time before this, B the deponent and his brother having received a twenty-shilling note for wages, and having given it to the defender to get change for it, the defender did not return the change, so the price of the hay-rick was understood to answer for the above twenty-shilling note,—and as to the balance, the deponent paid a drink-penny C to the hay-makers, which the defender was to account to him for at settling accompts.

(Signed) { GEORGE M'ALPIN.
WILL. BAILLIE, *Preses.*

Wit. 9. D WILLIAM M'ALPIN in Ricearton, aged 30 and upwards, married, being solemnly sworn, purged and examined, depones and concurs with the preceding witness *in omnibus. Causa scientie patet, &c.*

E (Signed) { WILLIAM M'ALPIN.
WILL. BAILLIE, *Preses.*

WATSON for the pursuers *in modum probationis* produced a receipt dated 11th September 1773, by the defender to Walter F Forrester writer in Linlithgow, for L. 4 Sterling, bearing to be as payment of Peter Paris's hay, sold and delivered to Mr Forrester, and craved judgment upon the foregoing proof and production..

C O P Y of W R I T S referred to in the preceding PROOF,
and exhibited therewith.

JOHN FINLAYSON bought of the EARL of ROSEBERY.

1773.

Jan. 25.	To 60 stones of hay, at 5 ¹ d.	-	L. 1	7	6
March 6.	To 60 stones of hay, at 5 ¹ d.	-	1	7	6
April 26.	To 120 stones of hay, at 5 ¹ d.	-	2	15	0
May 26.	To 240 stones of hay, at 5 ¹ d.	-	5	10	0
June 25.	To 240 stones of hay, at 5 ¹ d.	-	5	10	0
Aug. 17.	To a park of hay at Broadlaw, at	-	65	0	0
			<hr/>		
			L. 81	10	0

June 22. By cash, - L. 6 0 0

July 16. By cash, - 5 10 0

Oct. 13. By a bill due at Whit-
funday, - 65 0 0

76 10 0

Balance, L. 5 0 0

G

My

MY DEAR SIR,

Ochiltree, 19th December 1773.

I wrote you some days ago concerning your hay, and the manner they seem to use both you and me.

I therefore send your accompt inclosed, that you may know the better how to be aware of them. I mentioned the L. 3 : 8 s. which I received from you, and at same time I told you I should pay you that money back when I saw you : I therefore beg you will not make it known that I received any money from you than the L. 6, and L. 5 : 10 s. which you have credit for in your accompt ; so I hope you will remember this for my sake, and make out a copy of this just as it stands, that when any calls for your book at Candlemas, it will appear just as mine. Don't pay the balance till Candlemas, and by that time I will return your L. 3 : 8 s. I am, with my very best wishes,

My Dear Sir,

Your obedient Servant,

(Signed) ARCH. TAIT.

P. S. Write me in course of post, and let me know concerning it. A. T.

Directed on the back, *To Mr John Finlayson vintner, Falkirk.*

S I R,

Ochiltree, 27th January 1774.

I had a good mind to give you the bad oats for nothing, as they were not good : But some person or other has informed my Lord that I had sold you oats, and I was obliged to acknowledge it, and have entered them in your accompt at 9 s. *per boll*, which is not too high.

I have almost lost my place on that account, and a cart of hay the tenant James Meikle said he drove you on March last. I know you got one, and is placed to your accompt, but does not know of two ; and if you are not sensible of receiving the other one, do not acknowledge the receipt of it, for I am sure I do not know of it. You need not make this known to any person, as I place my confidence in you, and such honest men as you ;—but I have

have many enemies at present,—but I expect to get the better of them all. I have inclosed you my bill for the L. 3 : 8 6. I received from you, payable at Whitsunday, as I have not money to send you ; and I am sorry I am obliged to do so, but by the loss of that money I wrote you in my last,—my wages to Martinmas last is but small.

I will be at your house soon to settle this affair ;—and we remain for ever, with our most affectionate good wishes to you and Mrs Finlayson,

S I R,

Your most humble servant,

(Signed) ARCH. TAIT.

P. S. You may commit this to the flames after reading it.

A. T.

Addressed on the back thus,—*To Mr John Finlayson, vintner in Falkirk.*

L. 3 : 8 : 6.

Ochiltree, 6th December 1774.

Against the term of Whitsunday, pay to me or my order, at my house in Falkirk, the sum of three pound eight shillings and sixpence Sterling, value received.

To Arch. Tait, }
Overseer at Ochiltree. }

Accepts
(Signed) ARCH. TAIT.

Ochiltree, 5th July 1773.

Then received from Mr John Finlayson eleven pounds ten shillings Sterling, in full, for hay preceding the 22d day of May last.

(Signed) ARCH. TAIT.

September 11th 1773.

Received from Walter Forrester writer in Linlithgow, four pounds Sterling, as payment of Peter Paris's hay, sold and delivered you by

(Signed) ARCH. TAIT.

have many enemies at present—but I expect to get the better of them all. I have included your bill for the £. 3 : 8 : 1 in my return to you. I am sorry I am obliged to do so, but by the loss of that money I wrote you in my last—my way is to maintain half is that.

I will be at your house soon to settle this affair—and we will make for ever, with our most affectionate good wishes to you and Mrs. Fildes.

Yours most humble servant,
 (Signed) Archd. Tait

P.S. You may communicate this to the friends who are interested in it.

Addressed on the back—To Mr. John Fildes, Glasgow.

£. 3 : 8 : 1.
 Received the sum of £. 3 : 8 : 1 in full for my order at my house in Falkirk, the sum of three pounds eight shillings and six pence sterling, value received.
 To Mr. John Fildes
 (Signed) Archd. Tait

Received from Mr. John Fildes eleven pounds ten shillings sterling, in full for my order at my house in Falkirk, the sum of eleven pounds ten shillings and six pence sterling, value received.
 (Signed) Archd. Tait

Received from Walter Fowler writer in Linthgow, four pounds sterling, as payment of Peter Fildes's debt, old and new.
 (Signed) Archd. Tait